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Office-Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,
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No. 84-1002

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

DALE E. SAFFELS, UNITED STATES DISTRICT JUDGE
FOR THE DISTRICT OF KANSAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked jurisdiction over the Equal Employment Opportunity Commission's complaint in intervention where the EEOC had satisfied the statutory prerequisites for intervention set forth in Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), but had not also satisfied the statutory requirements for bringing a direct suit set forth in Section 706(b), 42 U.S.C. 2000e-5(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 741 F.2d 312. The memorandum opinion and orders of the district court (Pet. App. 6a-17a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1984. A petition for rehearing was denied on September 28, 1984 (Pet. App. 18a-19a).

The petition for a writ of certiorari was filed on December 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November, 1976, Phyllis Hoffman filed this suit against United Telecommunications, Inc. (UTI) and its 38 subsidiaries alleging that UTI had discriminated against her with respect to her compensation and other terms, conditions, and privileges of employment, in violation of Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a) and 2000e-3(a). She also alleged that UTI and its subsidiaries had engaged in widespread discriminatory employment practices against other women, and she sought to represent a class composed of "all females who are, were, or might be employed by [petitioners'] in managerial or professional positions at its headquarters in Westwood, Kansas, and at all offices of its subsidiaries and affiliates, and who have been or continue to be or might be adversely affected by" petitioners' discriminatory practices (Pet. App. 28a).

In September, 1977, the Equal Employment Opportunity Commission (EEOC) moved for leave to intervene in Hoffman's suit pursuant to Sections 705(g)(6) and 706(f)(1) of Title VII, 42 U.S.C. 2000e-4(g)(6) and 2000e-5(f)(1), and Rule 24(b) of the Federal Rules of Civil Procedure. EEOC's complaint in intervention made allegations of discriminatory employment practices that were substantially identical to those contained in Hoffman's complaint (Pet. App. 42a-48a). On September 21, 1977, the district court permitted the EEOC to intervene (see Pet. App. 8a).

For the next six years, the district court stayed all discovery on the class action issues and on the merits of the case pending the court's resolution of the question whether it had jurisdiction over petitioners' subsidiaries located outside the District of Kansas. After the court resolved that issue in complainants' favor,[1] on April 11, 1984, the court granted the joint motion of the EEOC and Hoffman permitting the EEOC to seek class-wide relief for the group of aggrieved individuals identified in their complaints without either EEOC or Hoffman being formally certified as a class representative under Fed. R. Civ. P. 23 (Pet. App. 6a-10a). The district court thereafter denied petitioners' request to certify the court's April 11 order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) (Pet. App. 11a-14a), and petitioners filed a petition for a writ of mandamus in the court of appeals.

2. The court of appeals dismissed the petition for mandamus, ruling that the district court's order was within its jurisdiction (Pet. App. 1a-5a). The court found (*id.* at 3a-4a) that EEOC had satisfied the two statutory prerequisites for intervention in an ongoing private Title VII action—certification that the case is one of general public importance and timely application to intervene—and also noted that the district court had exercised its discretion to permit the EEOC to intervene. The court thus concluded that the EEOC was a proper party to this suit. The court also rejected petitioners' argument that the EEOC was required to satisfy the administrative prerequisites to filing suit whenever it sought to intervene in an ongoing action. As the court explained (Pet. App. 4a),

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[1] See *Hoffman* v. *United Telecommunications, Inc.*, 575 F. Supp. 1463 (D. Kan. 1983).

"[t]hat Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures."

The court also held that the EEOC, once it had been allowed to intervene, was not required to be certified as a class representative under Fed. R. Civ. P. 23 in order to seek classwide relief for the group of individuals aggrieved by the discriminatory employment practices alleged in its complaint in intervention. The language of Title VII and its legislative history, the court concluded (Pet. App. 4a), indicate "that Congress viewed the Commission's role in suits initiated by it or in which it intervened to serve the identical purpose": vindication of the general public interest in preventing and remedying employment discrimination. Therefore, the court ruled that this Court's holding in *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), that EEOC enforcement actions are not governed by Fed. R. Civ. P. 23, applies equally when the EEOC intervenes in a private action (Pet. App. 5a).[2]

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[2] Following the court of appeals' ruling, petitioners moved in the district court for an order striking all classwide claims from Hoffman's complaint and amending the allegations of classwide discrimination in the EEOC's complaint to conform to those in Hoffman's original complaint (see Pet. App. 15a-16a). The district court held that its April 11 ruling rendered class certification for Hoffman unnecessary, and the court ordered Hoffman and the EEOC to conform the pretrial order to the court's April 11 ruling (*id.* at 16a-17a).

ARGUMENT

The sole question presented by the petition—whether the district court erred by permitting the EEOC to seek classwide relief as an intervenor without satisfying the administrative requirements necessary before the Commission may bring its own suit—is not properly before the Court at this time. Moreover, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is thus unwarranted.

1. While petitioners nominally seek review of the judgment of the court of appeals dismissing their petition for a writ of mandamus, petitioners do not contend that the district court lacked jurisdiction over the EEOC's motion for leave to intervene or the substantive claims presented in the EEOC's complaint in intervention (see Pet. 11 n.3). Rather, petitioners challenge the district court's April 11 order permitting the EEOC to seek classwide relief, and the basis of their claim is that the district court erroneously permitted the EEOC to seek classwide relief as an intervenor without having satisfied the administrative requirements of Section 706(b) of Title VII before the Commission may bring suit.[3]

Petitioners' contention is not properly before the Court at this time. The district court's April 11 ruling is not a final judgment, and it is also not an appealable collateral order, because it is not "effectively unreviewable on appeal from a final judgment" (*Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468

[3] Petitioners do not argue that the EEOC must comply with Fed. R. Civ. P. 23 to seek relief, as an intervenor, for a class of aggrieved individuals, since they assert that Rule 23 is not relevant at this stage of the proceedings (Pet. 10 n.1).

(1978)). That ruling places petitioners in precisely the same position they would have occupied if the district court had erroneously certified Hoffman as a class representative under Rule 23, and an order granting class certification is interlocutory (437 U.S. at 469, 476). Moreover, the district court refused to certify this issue for interlocutory review under 28 U.S.C. 1292(b) (Pet. App. 11a-14a). Accordingly, unless the district court's ruling exceeded its jurisdiction (see *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (per curiam)), petitioners' contention is not properly before the Court at this time.

Petitioners contend (Pet. 14-15) that the administrative procedures specified in Section 706(b) are a jurisdictional requirement that the EEOC must satisfy before the district court may entertain the EEOC's claims in intervention. That claim is in error. Section 706(f)(1) of Title VII governs the Commission's authority to intervene in a pending Title VII action, and nothing in the text or legislative history of that Section suggests that the EEOC must satisfy the administrative procedures necessary to bring suit before the district court obtains jurisdiction over the Commission's claims in intervention. On the contrary, Section 706(f)(1) of Title VII provides that "[u]pon timely application, the court may, in its discretion, permit the Commission * * * to intervene in * * * [a] civil action upon certification that the case is of general public importance." 42 U.S.C. 2000e-5(f)(1). As the court of appeals ruled (Pet. App. 4a), because these requirements were met, the district court had jurisdiction over the Commission's claims under Section 706(f)(3) of Title VII, which grants the district court jurisdiction over actions brought under Title VII. Accord, *Johnson* v.

Nekoosa-Edwards Paper Co., 558 F.2d 841, 847 (8th Cir.), cert. denied, 434 U.S. 920 (1977) (EEOC may intervene without first attempting conciliation). The court of appeals thus correctly denied the petition for mandamus.

Horn v. *Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982), provides no support for petitioners' argument. In *Horn*, the EEOC was dismissed from a private suit after the Commission had been granted leave to intervene. While the EEOC's appeal of the district court's revocation order was pending, the private parties settled the action and the plaintiff dismissed her suit. The court of appeals treated the Commission's appeal from the revocation order as a new application to intervene and held that the EEOC could not intervene in an already-settled private action without satisfying the statutory requirements for bringing a direct suit.[4] *Horn* thus stands for the unremarkable proposition that the EEOC cannot intervene in a case that is moot. That decision, however, did not address the scope of EEOC's authority to intervene or to seek classwide relief in a pending suit. Petitioners' reliance upon *Horn* is thus misplaced.

Nor do the district court decisions on which petitioners rely (Pet. 17 & n.6) support their argument.

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[4] While we believe that the court in *Horn* erred in treating EEOC's appeal in that case as if it were a new application to intervene, it is clear that the court in *Horn* viewed the EEOC's appeal in that manner. That court based its ruling entirely on decisions involving a party's attempt to intervene in a suit where either the entire original action or particular claims of the original plaintiff had already been dismissed. See cases cited at 686 F.2d at 440. See also *EEOC* v. *Dayton Tire & Rubber Co.*, 573 F. Supp. 782, 786 n.5 (S.D. Ohio 1983) (characterizing *Horn* as a case where "the Court refused to permit the EEOC to intervene in an action that had settled").

In none of those decisions did the court rule that it lacked jurisdiction over the claims in intervention presented by the EEOC. Rather, those courts simply exercised their discretion to permit the EEOC to assert only those claims that had already been raised by the private plaintiffs. Those decisions thus do not support petitioners' argument that district courts lack jurisdiction over broader claims presented by the EEOC.[5] In fact, those decisions are fully consistent with the district court's ruling in this case, which permitted the Commission to intervene and to raise the same claims that Hoffman had alleged in her complaint.

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[5] The decisions cited by petitioners are distinguishable for another reason as well: each case involved the EEOC's attempt to expand the scope of the private suit then pending before the district court. See *Bell* v. *McDermott & Co.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,309 (E.D. La. 1982); *Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447 (E.D. Ark. 1980); *Troup* v. *Piper, Jaffray & Hopwood, Inc.*, 16 Fair Empl. Prac. Cas. (BNA) 1554 (D. Minn. 1975); *National Organization for Women, Inc.* v. *Minnesota Mining & Manufacturing Co.*, 73 F.R.D. 467 (D. Minn. 1977); *Jones* v. *Holy Cross Hospital Silver Spring, Inc.*, 64 F.R.D. 586 (D. Md. 1974).

By contrast, in this case the claims in EEOC's complaint in intervention are virtually identical to the claims in Hoffman's complaint. The difference between this case and the district court decisions cited above has substantial importance. The question whether it is an abuse of discretion for the district court to permit the EEOC to continue to pursue classwide claims after the scope of a private suit is narrowed involves very different considerations from the question whether the EEOC should be permitted to seek classwide relief as an intervenor in the first place. Retroactively limiting the claims that the EEOC may raise as an intervenor in a private action after the EEOC has devoted considerable time and resources to the case unreasonably wastes the Commission's limited resources to enforce Title VII.

More importantly for present purposes, the district court's exercise of its discretion in permitting the EEOC, as an intervenor, to assert the same claims Hoffman had alleged, as the court of appeals correctly held (Pet. App. 5a), is not reviewable on mandamus (see *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. at 36). As the Court explained in *Allied Chemical Corp.* v. *Daiflon, Inc., supra*, a party seeking a writ of mandamus must show that his right to issuance of the writ is "clear and indisputable" (*id.* at 35 (citations omitted)), which he cannot establish where the matter in dispute is committed to the discretion of the court (*id.* at 36). Thus, because the issue on which petitioners seek review, whether the district court properly allowed the EEOC to seek classwide relief, is not properly before the Court in this mandamus proceeding, further review of the court of appeals' decision is unwarranted.

2. In any event, the court of appeals' ruling is correct. Petitioners do not seriously dispute the court of appeals' holding that neither the text of Sections 705(g)(6) and 706(f)(1) of Title VII nor the legislative history of those provisions (Pet. App. 3a-4a) requires the Commission, before intervening, to complete the administrative procedures necessary before the EEOC can bring suit in its own name. Nor do petitioners ask the Court to reconsider its holding in *General Telephone Co.* v. *EEOC, supra*, that the EEOC may seek classwide relief without satisfying the requirements of Fed. R. Civ. P. 23. Rather, petitioners claim (Pet. 10-16) that, as a matter of policy, the EEOC should be denied the right to pursue such claims as an intervenor until it has completed the Section 706(b) administrative prerequisites to a direct action. That claim is without merit.

The short answer to petitioners' argument is that, as the court of appeals recognized (Pet. App. 3a), Congress expressly authorized the procedure followed by EEOC in this case. Congress could easily have drafted the intervention provision of Section 706 (f)(1) to parallel the direct suit component of that section, but Congress did not, and the courts may not attribute that difference to legislative oversight (see, *e.g.*, *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 6-7). Because nothing in the legislative history of Section 706(f)(1) discloses "a clearly expressed legislative intention to the contrary," the unambiguous language of Section 706(f)(1) is "conclusive" (*Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Petitioners' reliance (Pet. 11-12) upon *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355 (1977), is misplaced. The sole question presented by that case was "what time limitation, if any, is imposed on the EEOC's power to bring [a Title VII] suit" against a private employer alleged to have violated that Act (432 U.S. at 357). Moreover, the Court's discussion of the administrative process established by Section 706(b) (see 432 U.S. at 359-360) was prefaced by the observation that it conditions "the EEOC's authority to *bring* a civil action in a federal court" (*id.* at 359 (emphasis added)). *Occidental Life Ins. Co.* nowhere suggested that those procedures also condition the Commission's authority either to intervene in a pending Title VII action or to seek classwide relief once the Commission is a party to an action. Indeed, *General Telephone Co.* v. *EEOC*, *supra*, expressly ruled that the EEOC has the authority to seek classwide relief for victims of discrimination and does not suggest that a different rule should be applied simply

because the Commission has chosen to intervene in a private Title VII action, rather than to bring a direct suit.

Nor do the policy considerations invoked by petitioners justify rewriting the statute. Congress required the Commission to investigate a claim of discrimination, to find reasonable cause to believe that the claim is true, and to attempt conciliation before filing a direct suit to ensure that all reasonable possibilities of voluntary compliance have been exhausted before the Commission resorts to litigation. See *EEOC* v. *Shell Oil Co.*, No. 82-825 (Apr. 2, 1984), slip op. 22; *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 367-368; *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d at 847. Once a private party has filed suit, however, the possibility of securing voluntary compliance is, at least, greatly diminished, and any marginal contribution toward that goal resulting from continued efforts at conciliation would be more than offset by the difficulties that the EEOC would face in its investigation of an actual, rather than a potential, defendant. Cf. *EEOC* v. *Shell Oil Co.*, slip op. 14, 25-26. In any event, Section 706(f)(1) empowers a court to stay proceedings up to 60 days pending the Commission's efforts at voluntary compliance. That procedure provides a mechanism through which litigation can still be avoided even though suit has been filed and the EEOC has intervened.

Petitioners' construction of Title VII could also render the Commission's right to intervene a nullity. In most cases, the opportunity for the Commission to intervene in a lawsuit arises where, in a case of general public importance, a charging party files suit before the Commission has finished its administrative process and thus has the opportunity to bring its own suit. Requiring the EEOC to exhaust the administrative process before filing a complaint in in-

tervention could prevent the Commission from protecting the public interest in privately-initiated suits by rendering the Commission's later attempt to intervene untimely (see *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d at 847), a matter of considerable importance given the complexity of the charges often filed and the length of time necessary to complete the "integrated, multistep enforcement procedure" established by Title VII (*Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 359; *EEOC* v. *Shell Oil Co.*, slip op. 6-9). In fact, this risk is especially acute in the Tenth Circuit, because, as the district court recognized (Pet. App. 10a), in that court the filing of a private Title VII action forecloses the Commission from bringing suit in its own name based upon the plaintiff's charges. *EEOC* v. *Continental Oil Co.*, 548 F.2d 884 (1977). The construction of Title VII advanced by petitioners could thus seriously hamper the EEOC's ability effectively to enforce the Act.

3. Petitioners also contend (Pet. 15-17) that the court of appeals' decision allows the EEOC to transform individual claims for relief into class suits simply by intervening and, in so doing, to evade the administrative process established by Section 706(b) merely by awaiting a private suit or through "contrivance" (Pet. 17) with plaintiff's counsel. That argument is misconceived.

In the first place, the court of appeals' decision does not empower the EEOC to seek classwide relief; the Commission has that authority, as this Court ruled in *General Telephone Co.* v. *EEOC*, by virtue of Sections 706(a) and 706(f)(1) of Title VII (446 U.S. at 323-325). The court of appeals simply declined to restrict that authority by engrafting onto Section 706 (f)(1) additional requirements not found in the text of the statute. Second, the claim that the EEOC can

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itself unwarrantedly and burdensomely transform private claims for relief into class actions overlooks the fact that the Commission's right to intervene in private Title VII actions is subject to the discretion of the district court, which retains the authority to limit the claims that the Commission may raise to those already presented by a private plaintiff, as the decisions petitioners themselves cite (Pet. 17 n.6) make clear. The court of appeals' decision in no way restricts the ability of a district court to exercise its discretion to limit intervention in an appropriate case or to stay further proceedings to allow the parties to attempt settlement if the court believes that doing so may be useful. More fundamentally, petitioners have cited no evidence that Congress intended to restrict the EEOC's authority to protect the public interest once the Commission has intervened in a private suit. Petitioners' real complaint therefore is not with the court of appeals' decision, but is with this Court's decision in *General Telephone Co.* v. *EEOC*, *supra*.[6]

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[6] The unusual posture in which this issue arose also renders further review inappropriate. It is clear that the EEOC has not in some way abused its authority to seek classwide relief in this case, even if that were relevant. Hoffman originally filed this suit as a class action, and that matter was still pending when the EEOC sought to intervene. Hoffman still sought certification as a class representative at the time the EEOC sought relief for the class identified in her complaint. Had Hoffman been certified as a class representative, either before or after the EEOC intervened, the issue presented by petitioners would be immaterial. This case therefore does not fairly present the situation that petitioners claim will become commonplace if the decision below is allowed to stand. The concerns petitioners raise are properly addressed in a case in which the private plaintiff declines to seek classwide relief from the outset. Because that is clearly not the situation here, this case does not merit further consideration.

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Petitioners' forecast (see Pet. [redacted] 16-17) that, unless the court of appeals' decision is set aside, the EEOC will hereafter abandon its efforts to secure voluntary compliance with Title VII is also in error. EEOC has always been firmly committed to the use of voluntary compliance as the preferred means of resolving Title VII cases and continues to settle the great majority of all charges filed. Indeed, throughout this litigation, EEOC has indicated its willingness, either formally or informally, to discuss voluntary settlement. The unusual facts of this case provide no basis for calling that commitment into question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1985

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